

IN THE MATTER OF:)	
)	
Delview Properties, LLC)	
)	CONSENT ORDER NO. <u>14-</u>
Demolition Site – 320 Reed Street)	
Tuscaloosa, Tuscaloosa County, Alabama)	
)	

This Special Order by Consent is made and entered into by the Alabama Department of Environmental Management (hereinafter, “the Department” and/or “ADEM”) and Delview Properties, LLC (hereinafter, “Delview”) pursuant to the provisions of the Alabama Environmental Management Act, Ala. Code §§22-22A-1 to 22-22A-16 (2006 Rplc. Vol.), the Alabama Air Pollution Control Act, Ala. Code §§22-28-1 to 22-28-23 (2006 Rplc. Vol.), and the regulations promulgated pursuant thereto.

1. Delview is the owner of the property located at 320 Reed Street in Tuscaloosa, Tuscaloosa County, Alabama (hereinafter, “the Property”) where an apartment complex once stood.

2. The Department is a duly constituted department of the State of Alabama pursuant to Ala. Code §§22-22A-1 to 22-22A-16 (2006 Rplc. Vol.).

3. Pursuant to Ala. Code §§ 22-22A-4(n) (2006 Rplc. Vol.), the Department is the state air pollution control agency for the purposes of the federal Clean Air Act, 42 U.S.C. 7401 to 7671q, as amended. In addition, the Department is authorized to administer and enforce the provisions of the Alabama Air Pollution Control Act, Ala. Code §§22-28-1 to 22-28-23 (2006

Rplc. Vol.).

4. The U.S. Environmental Protection Agency's National Emission Standard for Asbestos, found at 40 C.F.R. Part 61, Subpart M, is incorporated by reference in ADEM Admin. Code r. 335-3-11-.02(12).

5. 40 CFR §61.145 (a) requires that a subject structure be thoroughly inspected for the presence of asbestos prior to demolition.

6. 40 CFR §61.145 (b) requires that a written notification be submitted ten weekdays prior to demolition.

7. 40 CFR §61.145 (c) requires that Category II non-friable asbestos-containing material be removed from a structure prior to demolition.

DEPARTMENT'S CONTENTIONS

8. The Property consisted of structures subject to the provisions of 40 C.F.R., Part 61, Subpart M and ADEM Admin. Code r. 335-3-11-.02(12)

9. On August 14, 2014, the Department conducted an inspection of the Property and observed that demolition activities were in progress. The Department did not receive written notification for the demolition of these structures, which would have indicated that an inspection by an accredited asbestos inspector was or was not conducted prior to demolition.

10. A roofing sample collected by an accredited ADEM asbestos inspector from demolition debris located on the Property on August 14, 2014 contained at least 25% asbestos fibers. It is classified as Category II non-friable asbestos containing material.

11. Another sample was taken from dust located approximately 100 yards from the Property that contained greater than 1% asbestos fibers.

11. On August 26, 2014 the Department issued a Notice of Violation to Delview

concerning the violations alleged above.

12. Pursuant to Ala. Code §22-22A-5(18)c., *as amended*, in determining the amount of any penalty, the Department must give consideration to the seriousness of the violation, including any irreparable harm to the environment and any threat to the health or safety of the public; the standard of care manifested by such person; the economic benefit which delayed compliance may confer upon such person; the nature, extent and degree of success of such person's efforts to minimize or mitigate the effects of such violation upon the environment; such person's history of previous violations; and the ability of such person to pay such penalty. Any civil penalty assessed pursuant to this authority shall not exceed \$25,000.00 for each violation, provided however, that the total penalty assessed in an order issued by the Department shall not exceed \$250,000.00. Each day such violation continues shall constitute a separate violation. In arriving at this civil penalty, the Department has considered the following:

A. SERIOUSNESS OF THE VIOLATION: The Department considers Delview's failure to have the Property inspected for the presence of asbestos before demolition to be serious because of the harmful emissions produced when asbestos containing material was crushed during the demolition process.

B. THE STANDARD OF CARE: Failure to have the Property inspected for the presence of asbestos prior to demolition illustrates that Delview did not use the standard of care as required by the ADEM Administrative Code.

C. ECONOMIC BENEFIT WHICH DELAYED COMPLIANCE MAY HAVE CONFERRED: There was economic benefit in Delview's actions because of the costs that were foregone by not having the Property inspected and not having asbestos containing material removed before demolition.

D. EFFORTS TO MINIMIZE OR MITIGATE THE EFFECTS OF THE VIOLATION UPON THE ENVIRONMENT: There are no known air environmental effects to mitigate as a result of the alleged violations because of the dispersion into the atmosphere that already occurred.

E. HISTORY OF PREVIOUS VIOLATIONS: The Department is unaware of previous violations of applicable requirements by Delview.

F. THE ABILITY TO PAY: Delview has not alleged an inability to pay the civil penalty.

G. OTHER FACTORS: It should be noted that this Special Order by Consent is a negotiated settlement and, therefore, the Department has compromised the amount of the penalty to resolve this matter amicably without incurring the unwarranted expense of litigation (see Attachment A, which is made a part of Department's contentions).

13. The Department neither admits nor denies Delview's contentions, which are set forth below. The Department has agreed to the terms of this Consent Order in an effort to resolve the alleged violations cited herein without the unwarranted expenditure of State resources in further prosecuting the above violations. The Department has determined that the terms contemplated in this Consent Order are in the best interests of the citizens of Alabama.

DELVIEW'S CONTENTIONS

14. Delview neither admits nor denies the Department's contentions. Delview consents to abide by the terms of this Consent Order and to pay the civil penalty assessed herein.

ORDER

THEREFORE, Delview, along with the Department, desires to resolve and settle the compliance issues cited above. The Department has carefully considered the facts available to it

and has considered the six penalty factors enumerated in Ala. Code §22-22A-5(18)c., *as amended*, as well as the need for timely and effective enforcement, and has determined that the following conditions are appropriate to address the violations alleged herein. Therefore, the Department and Delview agree to enter into this ORDER with the following terms and conditions:

A. Delview agrees to pay to the Department a civil penalty in the amount of \$5,000.00 in settlement of the violations alleged herein within forty-five days from the effective date of this Consent Order. Failure to pay the civil penalty within forty-five days from the effective date may result in the Department's filing a civil action in the Circuit Court of Montgomery County to recover the civil penalty.

B. Delview agrees that all penalties due pursuant to this Consent Order shall be made payable to the Alabama Department of Environmental Management by certified or cashier's check and shall be remitted to:

Office of General Counsel
Alabama Department of Environmental Management
P.O. Box 301463
Montgomery, Alabama 36130-1463

C. Delview agrees to comply with the terms, limitations, and conditions of the Department's regulations immediately upon the effective date of this Consent Order and every day thereafter.

D. The parties agree that this Consent Order shall apply to and be binding upon both parties, their directors, officers, and all persons or entities acting under or for them. Each signatory to this Consent Order certifies that he or she is fully authorized by the party he or she represents to enter into the terms and conditions of this Consent Order, to execute the Consent

Order on behalf of the party represented, and to legally bind such party.

E. The parties agree that this Consent Order, subject to the terms of these presents and subject to provisions otherwise provided by statute, is intended to operate as a full resolution of the violations which are cited in this Consent Order.

F. Delview agrees that it is not relieved from any liability if it fails to comply with any provision of this Consent Order.

G. For purposes of this Consent Order only, Delview agrees that the Department may properly bring an action to compel compliance with the terms and conditions contained herein in the Circuit Court of Montgomery County. Delview also agrees that in any action brought by the Department to compel compliance with the terms of this Agreement, Delview shall be limited to the defenses of *Force Majeure*, compliance with this Agreement and physical impossibility. A *Force Majeure* is defined as any event arising from causes that are not foreseeable and are beyond the reasonable control of Delview, including its contractors and consultants, which could not be overcome by due diligence (i.e., causes which could have been overcome or avoided by the exercise of due diligence will not be considered to have been beyond the reasonable control of Delview) and which delays or prevents performance by a date required by the Consent Order. Events such as unanticipated or increased costs of performance, changed economic circumstances, normal precipitation events, or failure to obtain federal, state, or local permits shall not constitute *Force Majeure*. Any request for a modification of a deadline must be accompanied by the reasons (including documentation) for each extension and the proposed extension time. This information shall be submitted to the Department a minimum of ten working days prior to the original anticipated completion date. If the Department, after review of the extension request, finds the work was delayed because of conditions beyond the control

and without the fault of Delview, the Department may extend the time as justified by the circumstances. The Department may also grant any other additional time extension as justified by the circumstances, but it is not obligated to do so.

H. The Department and Delview agree that the sole purpose of this Consent Order is to resolve and dispose of all allegations and contentions stated herein concerning the factual circumstances referenced herein. Should additional facts and circumstances be discovered in the future concerning the Property which would constitute possible violations not addressed in this Consent Order, then such future violations may be addressed in Orders as may be issued by the Director, litigation initiated by the Department, or such other enforcement action as may be appropriate, and Delview shall not object to such future orders, litigation or enforcement action based on the issuance of this Consent Order if future orders, litigation or other enforcement action address new matters not raised in this Consent Order.

I. The Department and Delview agree that this Consent Order shall be considered final and effective immediately upon signature of all parties. This Consent Order shall not be appealable, and Delview does hereby waive any hearing on the terms and conditions of same.

J. The Department and Delview agree that this Order shall not affect his obligation to comply with any Federal, State, or local laws or regulations.

K. The Department and Delview agree that final approval and entry into this Order are subject to the requirements that the Department give notice of proposed Orders to the public, and that the public have at least thirty days within which to comment on the Order.

L. The Department and Delview agree that, should any provision of this Order be declared by a court of competent jurisdiction or the Environmental Management Commission to be inconsistent with Federal or State law and therefore unenforceable, the remaining provisions

hereof shall remain in full force and effect.

M. The Department and Delview agree that any modifications of this Order must be agreed to in writing signed by both parties.

N. The Department and Delview agree that, except as otherwise set forth herein, this Order is not and shall not be interpreted to be a permit or modification of an existing permit under Federal, State or local law, and shall not be construed to waive or relieve the Delview of its obligations to comply in the future with any permit.

Executed in duplicate, with each part being an original.

DELVIEW PROPERTIES, LLC

**ALABAMA DEPARTMENT OF
ENVIRONMENTAL MANAGEMENT**

(Signature of Authorized Representative)

Lance R. LeFleur
Director

(Printed Name)

Date Executed

(Printed Title)

Date Signed

Attachment A

**DELVIEW PROPERTIES, LLC.
Tuscaloosa, Tuscaloosa County, Alabama**

Violation*	Number of Violations*	Seriousness of Violation*	Standard of Care*	History of Previous Violations*	
Violation of asbestos regulations	3	\$3000	\$1000	\$0	
					Total of Three Factors
TOTAL PER FACTOR		\$3000	\$1000	\$0	\$4,000

Adjustments to Amount of Initial Penalty	
Mitigating Factors (-)	
Ability to Pay (-)	
Other Factors (+/-)	
Total Adjustments (+/-) <i>Enter at Right</i>	\$0

Economic Benefit (+)	\$1000
Amount of Initial Penalty	\$4000
Total Adjustments (+/-)	\$0
FINAL PENALTY	\$5,000

Footnotes

* See the "Department's Contentions" portion of the Order for a detailed description of each violation and the penalty factors.